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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

LOUIS KEMP, SUPERIOR SEAFOODS, INC. and QUALITY FINER FOODS, INC.,

Plaintiffs/Counter-Defendants,

v.

TYSON FOODS, INC. and BUMBLE BEE SEAFOODS, INC.,

Defendants/Counter-Plaintiffs.

Civil No. 96-173 (JRT/RLE)

MEMORANDUM OPINION AND ORDER

John D. Kelly and Mark D. Pilon, HANFT FRIDE O'BRIEN, HARRIES, SWELBAR & BURNS, 1000 U.S. Bank Place, 130 West Superior Street, Duluth, Minnesota 55802-2094, for plaintiffs.

Ethan Horwitz, Kandis M. Kahn, Elliot R. Basner, DARBY & DARBY P.C., 805 Third Avenue, New York, NY 10022; and Joseph J. Roby, Jr., JOHNSON KILLEN & SEILER, P.A., 800 Wells Fargo Center, 230 West Superior Street, Duluth, MN, 55802, for defendants.

Plaintiffs filed this lawsuit for a declaratory judgment after defendants objected to plaintiffs' use of the LOUIS KEMP mark in connection with its marketing, selling and distribution of wild rice food products. Defendants maintain that plaintiffs are contractually barred from using LOUIS KEMP on these and other products pursuant to contractual agreements entered into between Louis Kemp and defendants' predecessor in

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FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD. ____
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interest, Oscar Mayer. Plaintiffs claim that these same agreements grant plaintiffs the right to use LOUIS KEMP on all products other than surimi-based seafood products.[1]

This matter is now before the Court on cross-motions for partial summary judgment[2] to declare the parties' contractual rights and restrictions to use the LOUIS KEMP mark.[3] Defendants also move for summary adjudication of plaintiffs' tortious interference with contract and unfair competition claims.

Defendants' third motion is to dismiss certain of plaintiffs' claims as precluded or, in the alternative, to enforce the consent judgment submitted as part of defendants' motion. At oral argument, plaintiffs' counsel informed the Court that his client was agreeable to the consent judgment. Defendants' motion is thus moot.[4] As confirmed by the parties at the motion hearing, the remaining issues in this litigation are: 1) plaintiffs' declaratory judgment claim concerning the parties' contractual rights to the LOUIS KEMP mark; 2) plaintiffs' tortious interference claim against Tyson; and 3) defendants' trademark infringement counterclaims.

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[1] "Surimi" is a fish product that is used in creating artificial crab and other similar products that are low in fat and cholesterol.

[2] Although defendants caption their motion as one for summary judgment, the Court considers it a motion for partial summary judgment since resolution of the motion in defendants' favor will not resolve all claims asserted in this case.

[3] Defendants also bring claims for trademark infringement on the basis that plaintiffs' use of LOUIS KEMP in connection with wild rice products causes confusion and dilution of defendants' federally registered trademarks for surimi-based seafood products. These claims are not the subject of any of the motions currently pending before the Court.

[4] For purposes of the record file, the Court requests that the parties submit a signed stipulation and order relating to entry and enforceability of the consent judgment for the Court's signature.

BACKGROUND

The Kemp family has been engaged in the wholesale and retail sale of seafood since 1930. In 1985, Louis Kemp ("Kemp") started Kemp Foods, Inc., a company that makes and sells artificial crab and similar processed fish products made from surimi, a low-fat processed fish product. In 1987, Kemp decided to sell his surimi-seafood business to Oscar Mayer Foods Corporation ("Oscar Mayer"). On March 30, 1987, the parties entered into a Stock Acquisition Agreement (the "Agreement"). As part of the Agreement, Kemp transferred various U.S. trademarks, including KEMP, KEMP's and KEMP's & Design, to Oscar Mayer. Kemp also placed contractual restrictions on his right to use the marks in the future. These restrictions, embodied in sections 7.5, 7.6 and 7.7 of the Agreement, provide:

> 7.5 Seller [Louis E. Kemp] represents and warrants that Seller or any entity in which Seller has an interest (except for Company [Kemp Foods, Inc.]) has never engaged and is not presently engaged in marketing, selling, or otherwise distributing at retail any product bearing the name KEMP, KEMP'S, KEMP'S & Design or any variation thereof except as disclosed and described in Exhibit 35 attached hereto. Seller agrees that neither Seller, nor any entity in which Seller has an interest, shall in the future market, sell or otherwise distribute any product except as provided in Section 7.6 and 7.7 or any other food or any other food or beverage product either at wholesale or retail bearing the name KEMP, KEMP'S, KEMP'S & Design or any variation thereof.
>
> 7.6 Seller agrees that within nine months, Seller or any entity in which Seller has an interest, shall cease all use of the name KEMP, KEMP'S, and KEMP's & Design in connection with the marketing, selling or otherwise distributing of any products.[5]
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> 7.7 It is agreed that Seller or any entity in which Seller has an interest, may market, sell or otherwise distribute those products identified on Exhibit 36,

[5] As explained by defendants, section 7.6 provided for a nine-month phase-out period after the close of the Agreement and thus was no longer applicable after that time, including when the parties amended the Agreement in 1989.

> attached hereto, bearing a composite trademark consisting of the word KEMP or KEMP's and preceded by one or more additional words the selection of which shall be approved in advance in writing by Buyer. The terms of said Exhibit 36 may not be changed or modified except with the approval by Buyer, such approval not to be unreasonably withheld, and by an instrument in writing duly signed on behalf of Buyer and Seller. It is the intention of the parties to avoid any likelihood of confusion among consumer resulting from the use of the respective marks of Seller and Buyer. It is further agreed that the companies described in Exhibit 37 as indicated in Exhibit 37 attached hereto for all purposes except in connection with the marketing, selling or distribution of products.

Approximately six months after the parties finalized the Agreement, Lee Scheele ("Scheele"), Oscar Mayer Vice-President, asked Kemp if Oscar Mayer could use Kemp's personal name, Louis Kemp, to market its surimi-based seafood products. This was the first time anyone had contemplated using Louis Kemp in connection with the sale of Kemp products. Kemp granted Scheele's request and on June 23, 1989, approximately eighteen months after that meeting, the parties entered into Amendment 1 to the 1987 Agreement (the "Amendment"). Section 7.8 of that Amendment provides, in its entirety:

> Seller [Kemp] grants to Buyer [Oscar Mayer] (a) the right to use and register the mark LOUIS KEMP, any design marks incorporating LOUIS KEMP and/or LOUIS KEMP SEAFOOD COMPANY in the United States and elsewhere for surimi-based seafood products and such other seafood and fish accessory products within the natural zone of product expansion; and (b) the right to adopt, use and register the name LOUIS KEMP SEAFOOD COMPANY in the United States and elsewhere as a trade name or as the corporate, firm or business title of any business, operating division or subsidiary of Buyer for the sale of surimi-based seafood products and such other seafood and fish accessory products within the natural zone of product expansion. Seller hereby agrees to reasonably cooperate with Buyer in obtaining trademark registrations, corporate, firm or business title recordals and/or trade name recordals that involve or include the name described in this section 7.8 and shall execute, at no expense to Seller, all consents and documents reasonably necessary for said registrations and recordals. Seller further agrees that it shall not attack or assist another in attacking the validity of the trademark LOUIS KEMP or any design marks incorporating LOUIS KEMP or any registration thereof permitting

> hereunder or the trade name LOUIS KEMP SEAFOOD COMPANY or any recordals thereof owned by Buyer in the United States or elsewhere.

The Amendment also deleted and inserted a revised version of section 7.7. Amended section 7.7 now provides, in relevant part:

> It is agreed that Seller, or any entity in which Seller has an interest, may utilize a composite trademark consisting of the word KEMP or KEMP'S and preceded **or followed by** one or more additional words the selection of which shall be approved in advance in writing by Buyer in connection with the marketing, selling or distribution of those products identified in Exhibit 36.

(Emphasis added.) The Amendment expressly provides that "except as hereinabove amended, all other provisions of the Agreement shall remain in full force and effect."

On August 25, 1992, Oscar Mayer, through its parent corporation Kraft General Foods, sold its surimi seafood business to Tyson Foods, Inc ("Tyson"). Although Tyson acquired "all rights existing under . . . contracts . . . sales and purchase agreements," the sale split ownership rights to the KEMP and LOUIS KEMP trademarks. According to Schedule 4.5 of the Amended Asset Purchase Agreement, Tyson received rights to the LOUIS KEMP mark and any design or mark incorporating LOUIS KEMP and/or LOUIS KEMP SEAFOOD COMPANY while Oscar Mayer/ Kraft retained the KEMP, KEMP'S and KEMP'S & Design marks.

In October 1995, Quality Finer Foods ("Quality"), a company in which Kemp has an interest, started using LOUIS KEMP in connection with the sale of seasoned wild rice, chicken wild rice soup and wild rice with stir fry vegetables. To help with the manufacturing and sale of these products, Quality entered into a Custom Packing and Sales Agreement with Luigino's, Inc. The agreement contained a termination provision allowing Luigino's to cancel the contract with Quality "if any meaningful action (in the sole discretion of Luigino's attorney) is threatened or commenced against Quality Finer Foods or its owner, Louis Kemp, for trademark infringement, violation and the like."

Shortly after an article appeared in the Duluth newspaper discussing Kemp and Luigino's recent business venture, Tyson sent a cease and desist letter to both parties contesting Quality's use of the mark. Luigino's determined that this letter constituted "meaningful action" under the termination provision in the agreement and accordingly suspended its obligations under the contract.

Prompted by Tyson's actions, plaintiffs filed this lawsuit for a declaratory judgment of their right to use the mark in connection with the sale and marketing of wild rice products. Plaintiffs also allege that Tyson tortiously interfered with its contract with Luigino's and engaged in unfair competition by interfering with plaintiffs' right to market its wild rice food products. Defendants answered and counterclaimed, alleging statutory and common law claims for trademark infringement, false designation of origin, unfair competition, trademark dilution, deceptive trade practices, and refusal of trademark applications.[6]

ANALYSIS

I. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

[6] Since the commencement of this lawsuit, Tyson has sold its surimi seafood business to Bumble Bee Seafoods ("Bumble Bee"). Bumble Bee was accordingly added as the real party in interest with regards to the contractual and trademark infringement claims. Tyson remains a defendant in connection with the tortious interference with contract claim.

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not appropriate if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See id.* Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *See id.*

The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts in the record. *See Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076 (8th Cir. 1980). However, the nonmoving party may not merely rest upon allegations or denials in its pleadings, but it must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial. *See Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981).

II. Contractual Rights to LOUIS KEMP

Plaintiffs claim the right to register and use LOUIS KEMP, LOUIS KEMP COLLECTION and LOUIS KEMP SEAFOOD COLLECTION in connection with the sale of non-surimi food products. Plaintiffs maintain that pursuant to section 7.8 of Amendment 1 to the 1987 Agreement, they have the contractual right to use and register LOUIS KEMP on all products other than those expressly referred to in that section. Defendants argue that pursuant to section 7.5 of the Agreement, Kemp clearly and unambiguously agreed not to use LOUIS KEMP in connection with any products except in certain limited circumstances not applicable here.

The issue before the Court is one of contract interpretation. It is undisputed that Wisconsin law controls the contracts at issue in this case. *See* Agreement § 16.7. Under Wisconsin law, the construction of a contract's terms as well as the determination whether a contract is ambiguous, are issues of law to be decided by the court, not issues of fact for the jury. *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 50 F.3d 476, 480 (7^{th} Cir. 1995) (interpreting Wisconsin law).

The paramount goal of all contract interpretation is to discern the parties' intent. *Patti v. Western Machine Co.*, 241 N.W.2d 158, 160 (Wis. 1976). When a contract's terms are unambiguous, the court must give the contract its plain and ordinary meaning and construe it as it stands. *Ford Motor Co. v. Lyons,* 405 N.W.2d 354, 379 (Wis. Ct. App. 1987). Extrinsic evidence may be considered only if a court finds ambiguity in the contract. *See Patti,* 241 N.W.2d at 351; *Murphy v. MCC Inc.*, No. 98-1322, 1999 WL 42021 at *3 (unpublished opinion). "Contractual language is ambiguous when it is 'reasonably or fairly susceptible of more than one construction.'" *Id.* (quoting *Borchardt v. Wilk,* 456 N.W.2d 653, 656 (Wis. Ct. App. 1990)).

A. Plaintiffs Right to Register and Use LOUIS KEMP

The Court first addresses plaintiffs' claim that they have the contractual right to use LOUIS KEMP on all products other than those expressly referred to in section 7.8. According to plaintiffs, even though defendants acquired the right to register and use marks incorporating LOUIS KEMP, that right is limited to the realm of "surimi-based seafood products and such other seafood and fish accessory products within the natural zone of product expansion." Therefore, since the Amendment grants defendants only a limited right to use LOUIS KEMP, plaintiffs claim they are entitled to a judgment declaring their right to use the mark in all other respects.

It is clear that defendants acquired only a limited right to use and register LOUIS KEMP and LOUIS KEMP SEAFOOD COMPANY in connection with surimi-based seafood and related products. But the Court disagrees with plaintiffs' additional argument that plaintiffs acquired the affirmative contractual right to use LOUIS KEMP in all other respects.

Essentially, plaintiffs urge the Court to interpret section 7.8 as a "consent to use" or a "concurrent use" agreement. It is well-established that parties may contractually agree to share their rights to a particular trademark and that such agreements can supersede traditional trademark analysis. *See Application of E.I. Dupont, DeNemours & Co.,* 476 F.2d 1357 (U.S. Ct. Customs & Patent App. 1973); *In re N.A.D. Inc.,* 754 F.2d 996 (Fed. Cir. 1985). However, the plain language of section 7.8 simply provides no evidence that the parties intended section 7.8 to serve as such an agreement.[7] Section 7.8 relates solely to defendants' right to use and register the LOUIS KEMP mark for certain specific products. It says absolutely nothing about plaintiffs' rights to use the LOUIS KEMP mark. Consequently, plaintiffs' motion for partial summary judgment is denied.[8]

B. Defendants Right to Prevent Plaintiffs from Using LOUIS KEMP

The next issue is whether defendants have the contractual right to prevent plaintiffs from using the LOUIS KEMP mark. According to defendants, Kemp's contractual promise in section 7.5 not to market, sell or otherwise distribute any other food or beverage product either at wholesale or retail bearing the name KEMP, KEMP's, KEMP'S & Design **or any variation thereof** clearly and unambiguously extends to LOUIS KEMP. (Emphasis added.) Defendants' argument derives from the language of section 7.5, which provides, in relevant part:

> Seller agrees that neither Seller, nor any entity in which Seller has an interest, shall in the future market, sell or otherwise distribute any product except as provided in Section 7.6 and 7.7 **or any other food or any other**

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[7] *Good Earth Corp. v. M.D. Horton & Assocs.*, C-94-3455-CAL, 1996 WL 556946 (N.D. Cal. Apr. 30, 1996), a case relied on by plaintiffs, is distinguishable from the case at bar. *Good Earth* involved a claim by defendant that it acquired rights to the GOOD EARTH trademark greater than those granted in a purchase agreement. Here, defendants are not attempting to use LOUIS KEMP on products beyond those expressly mentioned in section 7.8. Additionally, defendants are not claiming a right to preclude plaintiffs from using LOUIS KEMP from any right granted in section 7.8. Rather, they claim such a right from a completely separate provision in the Agreement which they claim is enforceable against plaintiffs and extend to their use of marks such as LOUIS KEMP.

[8] The Court's holding that plaintiffs did not acquire an affirmative contractual right akin to rights acquired under a concurrent use agreement means that plaintiffs' use of marks incorporating LOUIS KEMP is subject to defendants' claims that: 1) plaintiffs are contractually barred from using LOUIS KEMP under separate provisions in the Agreement; and/or 2) plaintiffs' use of a similar mark causes consumer under standard trademark infringement analysis.

> **food or beverage product either at wholesale or retail bearing the name KEMP, KEMP'S, KEMP'S & Design or any variation thereof.**

(Emphasis added.) At this point, the Court is unwilling to find, as a matter of law, that the phrase "any variation thereof" unambiguously extends to LOUIS KEMP. First, it is unclear whether the phrase "any variation thereof" refers to variations of the particular words expressly mentioned in section 7.5, *see* Webster's Dictionary 1475 (1991) (defining variant as "a different spelling, pronunciation, or form of the same word") or whether, as defendants claim, such variations include the combination of additional words.

The ambiguity in the language is only amplified upon inspection of other provisions in the contract. *See Wausau Joint Venture v. Redevelopment Auth. of City of Wausau,* 347 N.W.2d 604, 608 (Wis. Ct. App. 1984) (noting that contract terms should be considered in context). For instance, section 7.7. refers to and defines a composite trademark as "consisting of the word KEMP or KEMP's and preceded or followed by one or more additional words."

Unlike the more ambiguous language contained in section 7.5, section 7.7's definition of a composite trademark unquestionably encompasses Louis Kemp. If section 7.5 was intended to extend to Louis Kemp it is unclear to the Court why language similar to that used in section 7.7 was not included in section 7.5. Although defendants claim that composite trademarks as defined in section 7.7 is simply one type of variation of the Kemp marks, it is equally plausible that variation could mean something different than a composite trademark as defined in section 7.7.

The Court is also reluctant to find at this time that variations of the KEMP marks unambiguously extend to Kemp's personal name, particularly where the record indicates that "Louis Kemp" had never been used prior to the Agreement. Other courts have refused to extend variations of a surname mark to an individual's personal name under similar circumstances.

In *Zion Corp v. Lebow,* 593 F. Supp. 551 (S.D.N.Y. 1984), a case strikingly similar to the case at bar, the court held that defendant was not contractually barred from using his personal name, Harry Lebow or H. Poe Lebow, as a tradename or trademark. The court reached this conclusion despite an express provision in a sale of business agreement by which sellers promised "not to use the [Lebow] name ***or any variant thereof*** in any business transaction in which [sellers] or any of them directly or indirectly have an interest as owner, employee or otherwise in connection with the men's clothing business." *Id.* at 554.

The contractual language in this case and in *Zion* also stand in stark contrast to other contractual agreements in which a seller agrees to restrict his use of a surname mark. *See e.g., Levitt Corp. v. Levitt,* 593 F.2d 463, 466 (2nd Cir. 1979) (seller agrees he does not have "the right to use or to authorize anyone else to use, the name "Levitt" **alone or in conjunction with any other names or words,** as the corporate, firm or business title, trade name or trademark of any business in any part of the United States or elsewhere in the world") (emphasis added).

There is also some question whether defendants even acquired the right to preclude plaintiffs from using LOUIS KEMP pursuant to section 7.5. At the time Kraft sold its business to Tyson, Kraft expressly retained rights to the KEMP marks while

Tyson acquired rights to the LOUIS KEMP marks. Thus, because sections 7.5-7.7 deal solely with the KEMP marks but arguably extend to other marks such as Louis Kemp, it is unclear whether Kraft retained exclusive control over the rights in these sections or whether some division of rights was intended by the parties.

Having concluded that the language in section 7.5 is sufficiently ambiguous, the Court may consider extrinsic evidence to ascertain the parties' intent. *See Murphy,* 1999 WL 42021 at *3 ("If the contract is ambiguous, extrinsic evidence may be used to discern the parties' intent."). A review of such evidence, however, fails to resolve the ambiguity one way or the other. Both parties have submitted conflicting evidence concerning whether the parties understood the phrase "any variation thereof" in section 7.5 to preclude plaintiffs from using LOUIS KEMP.[9] Accordingly, the resolution of this issue is for the jury. *See Patti,* 241 N.W.2d at 161 (resolution of ambiguity to be resolved by jury by using extrinsic evidence). Defendants' motion for summary judgment is thus denied.[10]

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[9] Plaintiffs submit affidavit testimony that Oscar Mayer representatives sought from Kemp an agreement that he restrict his use of LOUIS KEMP on all products, which supports plaintiffs' position that the parties did not believe the phrase "any variation thereof" extends to Louis Kemp. Defendants submit evidence that during negotiations of the Amendment, defendants considered allowing Kemp to use LOUIS KEMP in certain circumstances, but subsequently refused to grant Kemp such permission pursuant to their right to preclude Kemp from using variations of the KEMP mark under section 7.5 of the Agreement.

[10] Even if it is later determined that defendants have no contractual right to restrict plaintiffs' use of the LOUIS KEMP mark either because defendants did not acquire any rights to enforce the restriction provisions under sections 7.5 in its agreement with Kraft or because 7.5's phrase "any variation thereof" does not extend to LOUIS KEMP, defendants nevertheless retain the right to pursue their trademark infringement claims under standard trademark analysis. As owner of federally-registered trademarks LOUIS KEMP and LOUIS KEMP SEAFOOD COMPANY for surimi-based seafood products, defendants are entitled to claim that plaintiffs' use of a same or similar trademark should be stopped because its use of the mark is likely to cause consumer confusion.

III. Tortious Interference with Contract

Plaintiffs also claim that Tyson tortiously interfered with plaintiffs' contractual relationship with Luigino's, Inc. A cause of action for wrongful interference with a contractual relationship requires: "'(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages.'" *Kjesbo v. Ricks,* 517 N.W.2d 585, 588 (Minn. 1994) (*quoting* Furlev Sales and Assoc., Inc. v. North American Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn.1982)). Summary judgment is appropriate where the plaintiff fails to establish one element of the claim. *Rowlette & Assocs. v. Calphalon Corp.*, No. C8-99-1667, 2000 WL 385502 at *8 (Minn. Ct. App. Apr. 18, 2000).

Plaintiffs fail to set forth sufficient evidence that Tyson acted without justification in sending out a cease and desist letter to plaintiffs and Luigino's. Significantly, there is no wrongful interference with contract where one asserts "in good faith a legally protected interest of his own * * * believ [ing] that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction." *Kjesbo,* 517 N.W.2d at 588 (quoting Restatement (Second) of Torts § 773 (1979)).

In this case, Tyson had at least a good faith belief that its rights were being infringed. Plaintiffs' contention that Tyson's position was so incorrect on the face of the contract documents as to demonstrate bad faith is without merit. Tyson possessed rights to send the letter independent of any contract. As a registered holder of the LOUIS

KEMP trademark for surimi-based seafood products, Tyson has the right to prevent others from using marks that would cause confusion in the marketplace.

Tyson's decision to send the letter to Luigino's as well as plaintiffs is also insufficient to demonstrate Tyson's bad faith. Tyson sent the letter only after learning of the joint venture in the Duluth newspaper. Tyson's rights would reasonably extend to those parties it believed were contributing to infringement of its trademark rights. *See Celotex v. Insulite Co.,* 39 F.2d 213 (D. Minn. 1930) (patent owner sent cease and desist letters to all parties defendant believed were involved in infringing his patent, including agents, jobbers, and dealers in the building industry). The Court thus grants Tyson's motion for summary judgment on plaintiffs' tortious interference with contract claim.

IV. Unfair Competition Claim

The Court also dismisses plaintiffs' unfair competition claim. Under Minnesota law, "'[u]nfair competition is not a tort with specific elements; it describes a general category of torts which courts recognize for the protection of commercial interests.'" *Zimmerman Group Inc. v. Fairmont Foods of Minnesota, Inc.,* 882 F. Supp. 892, 895 (D. Minn. 1994) (quoting *Rehabilitation Specialists, Inc. v. Koering,* 404 N.W.2d 301, 305-06 (Minn. Ct. App. 1987). Torts included under the rubric of unfair competition are product disparagement, tortious interference with contract and improper use of trade secrets. *Id.* For this claim to stand, plaintiff must "identify the underlying tort which is the basis of the unfair competition claim." *Id.; see also LensCrafters, Inc v. Vision World, Inc.,* 943 F. Supp. 1481, 1490 (D. Minn. 1996).

In paragraph 13 of the complaint, plaintiffs allege that "[d]efendants are engaging in unfair competition by interfering with plaintiffs' rights to market wild rice food products under the name 'Louis Kemp,' causing plaintiffs continuing damages." Plaintiffs' claim fails for two reasons. First, the generalized statement fails to identify the specific tort which forms the basis of the claim. Second, to the extent the statement can be read to assert a claim based upon interference with contract, it is duplicative of Count II of plaintiffs' complaint and therefore fails. *See Zimmerman*, 882 F. Supp. 2d at 895 (dismissing plaintiff's unfair competition claim because it is duplicative of plaintiff's tortious interference claim asserted elsewhere in the complaint).[11]

ORDER

Based upon the foregoing, the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for partial summary judgment [Docket No. 76] is **DENIED**;

2. Defendants' motion for summary judgment [Docket No. 97] is **DENIED**;

3. Defendants' motion for summary adjudication of plaintiffs' claims for tortious interference with contract and unfair competition [Docket No. 91] is **GRANTED.** Counts II and III of plaintiffs' complaint [Docket No. 1] are **DISMISSED, with prejudice**;

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[11] It also appears that plaintiffs' unfair competition claim will be dismissed pursuant to the consent judgment. *See* Consent Judgment ¶ 9.

4. Defendants' motion to dismiss certain of plaintiffs' claims as precluded or in the alternative to enforce the consent judgment [Docket No. 86] is **DENIED as moot.**

DATED: March 31, 2001
at Minneapolis, Minnesota.

JOHN R. TUNHEIM
United States District Judge